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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-5170

MITCHELL THOMAS BLAZAK,

Petitioner,

v

THE STATE OF ARIZONA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does sentencing Petitioner more than five years after his conviction constitute a denial of his right to a speedy trial in violation of the Sixth Amendment and a denial of due process in violation of the Fifth and Fourteenth Amendments?

2. Does the imposition of the death penalty in a felony murder case constitute cruel and unusual punishment in violation of the Eighth Amendment?

3. Did the State's failure to charge Petitioner under the sentencing statute, A.R.S. § 13-454, deprive him of adequate notice of the nature and cause of the accusation in violation of the Sixth Amendment?

4. Does Arizona's death penalty scheme constitute cruel and unusual punishment in violation of the Eighth Amendment?

5. May the death penalty be imposed only by a jury, pursuant to the Sixth Amendment right to trial by jury?

6. Does placing the burden of proving mitigating circumstances on Petitioner constitute a denial of due process in violation of the Fifth and Fourteenth Amendments?

7. Has the Arizona death penalty been applied in violation of the equal protection clause of the Fourteenth Amendment?

8. Does the prosecution's failure to reveal the whereabouts of certain witnesses for the sentencing hearing constitute a denial of due process in violation of the Fifth and Fourteenth Amendments?

9. Does the sentencing of Petitioner to death based on the trial court's finding of one or more proper aggravating circumstances but also on an improper aggravating circumstance constitute a denail of due process in violation of the Fifth and Fourteenth Amendments?

CITATION OF OPINION BELOW

State v. Blazak, _____ Ariz. _____, 643 P.2d 694 (1982) aff'd. March 11, 1982. Petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure, 17 A.R.S. denied, November 20, 1979. Petitioner was resentenced to death September 11, 1980, and appealed. The Supreme Court of the State of Arizona ordered resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924, 99 S. Ct. 1254, 59 L.Ed.2d 478. State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977), aff'd., January 20, 1977. A copy of the final opinion of the Supreme Court of the State of Arizona affirming Petitioner's death sentence can be found in Appendix I, infra.

STATEMENT OF JURISDICTION

On March 11, 1982, the Supreme Court of the State of Arizona affirmed Petitioner's conviction and sentence in Pima County Superior Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

TABLE OF AUTHORITIES INVOLVED

Fifth Amendment to the United States Constitution

Sixth Amendment to the United States Constitution

Eighth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Arizona Constitution, Article 2, § 24, Rights of accused in criminal prosecutions

Former Arizona Revised Statutes § 13-451, repealed October 1, 1978, defined murder and malice aforethought

Former Arizona Revised Statutes § 13-452, repealed October 1, 1978, specified the degrees of murder

Former Arizona Revised Statutes § 13-453, repealed October 1, 1978, provided the punishment for murder

Former Arizona Revised Statutes § 13-454 was transferred and renumbered as § 13-703. Another former § 13-454, derived from Pen. Code 1901, § 933; Pen. Code 1913, § 1046; Rev. Code 1928, § 5050; and Code 1939, § 44.1814, and relating to burden on defendant of proving mitigating circumstances or excuse, was repealed by Laws 1973, Ch. 138, § 4.

STATEMENT OF THE CASE

Petitioner, Mitchell Thomas Blazak, was indicted on the charges of Assault with Intent to Commit Murder; First Degree Murder, two counts; and Attempted Armed Robbery. The charges arose out of an attempted robbery and a double homicide at the Brown Fox Tavern in Tucson on December 15, 1973.

On that date, a man wearing a ski mask shot and killed the bartender and a patron, when the bartender refused to hand over money. The assailant also shot and seriously wounded another patron.

In return for immunity, Kenneth Pease, Petitioner's companion on that evening, testified against Petitioner, who was convicted

on all counts on November 20, 1974. Petitioner's motion for a new trial was denied and he was sentenced to death on the two murder counts. Petitioner appealed, the court affirmed his conviction and rehearing was denied.

The trial court conducted proceedings on a petition for post-conviction relief, based on newly discovered evidence, pursuant to Rule 32, Arizona Rules of Criminal Procedure. The Arizona Supreme Court denied review of those proceedings and remanded the case for resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) cert. denied, 440 U.S. 924 (1979). The resentencing hearing was continued to allow the defense to hire an investigator to track down original witnesses who would be able to present mitigating evidence, in accordance with the Watson decision. Because of the time lapse, the investigator was unable to locate any of the witnesses sought. The prosecution refused to cooperate by providing any known whereabouts of these witnesses. The trial court found no mitigating circumstances sufficiently substantial to call for leniency, and Petitioner was resentenced to death on September 11, 1980. An appeal to the Arizona Supreme Court followed, and Petitioner's death sentence was affirmed.

RAISING THE FEDERAL QUESTION

The questions pertaining to the constitutionality of Arizona's death penalty were raised on the first appeal from Petitioner's sentencing. Questions pertaining to the constitutionality of the

applicability of the Watson decision, supra, were raised on appeal immediately after Petitioner's resentencing under those rules. Each of the constitutional questions presented here was raised as it occurred in the process and each was decided negatively by the Supreme Court of the State of Arizona in its final decision of March 11, 1982.

REASONS FOR GRANTING THE WRIT

SENTENCING PETITIONER MORE THAN FIVE YEARS AFTER HIS CONVICTION CONSTITUTES A DENIAL OF HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT AND A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner was convicted of two counts of first degree murder in this case in December, 1974. The Arizona Supreme Court ordered a resentencing to take place, such order being issued December 6, 1979. This constitutes a delay of sentencing of Petitioner of over five years. In answer to this question on appeal, the Arizona Supreme Court said,

> Neither this court nor the United States Supreme Court has found that the right to a speedy trial extends to sentencing. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980). Neither are we able to find that the defendant was prejudiced by the delay. All mitigating factors presented at the previous sentencing hearing were considered at the second sentencing, as well as new factors presented by the defendant. State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981). Also, the defendant has been unable to suggest any other mitigating factors which could not be shown by reason of this delay. We do not believe that the delay in resentencing resulted in prejudice to the defendant.

However, a number of cases have held that the constitutional

right to a speedy trial, provided for by the Sixth Amendment to the United States Constitution, applies to the period between conviction and sentencing. Juarez-Casares v. United States, 496 F.2d 190 (5th Cir. 1974), for example. In the Delaware case of State v. Cunningham, 25 Crim. Law Rptr. 2506, the considerations of Barker v. Wingo, 407 U.S. 514 (1974) were examined. The result was that a 39 month delay between conviction and sentencing violated the defendant's right to due process, and not only was he not sentenced, but his conviction was set aside.

The Supreme Court of the State of Washington has also considered this issue in State v. Edwards, 93 Wash.2d 162, 606 P.2d 1224 (1980). It concluded that if it assumed sentencing was part of the trial for speedy trial purposes, correction of an alleged error need not upset the conviction and the most gained would be resentencing. Edwards, supra, 606 P.2d at 1227, n.2.

The Arizona Supreme Court in State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied 449 U.S. 913, 101 S. Ct. 287, 66 L.Ed. 2d 141 (1980), stated that, "If such a rule were adopted, however, it would follow that the defendant would have to show some prejudice before being able to obtain relief." Petitioner contends that the showing of prejudice required for this Court to commute his sentence should not be significant. This case is unlike those where a defendant is contending that an indictment should be dismissed; or where he contends that his conviction should be reversed and he should be released from prison because of a speedy trial violation. Rather, Petitioner is asking only

that his sentence be commuted from death to life imprisonment.

It is important in this regard to consider several factors. First, the defendant has the burden of providing evidence of mitigatation at the resentencing hearing. The State, on the other hand, need merely go forward on the record it has already established at the original trial and sentencing. Second, the length of delay in this case is significant, more than five years. Third, the entire sentencing structure has changed as a result of State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). It is not possible for an attorney, five years after the fact, to retroactively suggest all the forms of mitigating evidence he might have elicited at the original sentencing. Many years have passed since Mr. Kashman represented Petitioner at the original trial. Thus his list of other mitigating evidence he might have explored at the original sentencing, had Watson been in effect, should not be construed as complete. (R.T. Sept. 11, 1980, pgs. 6 and 7). Fourth, the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193, 33 L.Ed.2d 101 (1972), stated explicitly that "if witnesses die or disappear during a delay, the prejudice is obvious." Fifth, the fact that Appellant did not call particular witnesses at his original sentencing does not mean they were not important to his presentation during the hearing on resentencing. Steelman, supra. Mr. Kashman made it clear at the resentencing that he did not think the previous statutory mitigation factors applied to Mr. Blazak. (R.T. Sept. 11, 1980, pg. 5, lines 8-10). It is conceivable that witnesses

who were available at the time were not called because their testimony did not comport with the categories of the pre-existing statute.

This Court should note that none of the twelve witnesses sought by Petitioner could be found. As the Court stated in Barker v. Wingo, supra, " . . . the inability of a defendant to prepare his case skews the fairness of the entire system." Id. at 532, 92 S.Ct. at 2193. The Court was referring to a situation in which the defendant does not carry the burden of proof. It must be reiterated that the Petitioner suffers greater prejudice at a sentencing because he must go forward with mitigating evidence. Finally, the length of the delay and the anxiety and concern of the accused cannot be discounted.

For all of these reasons, the Appellant has shown sufficient prejudice.

THE IMPOSITION OF THE DEATH PENALTY IN A FELONY MURDER CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Imposition of the death penalty upon one who has been convicted of a felony-murder, is violative of the Eighth Amendment's prohibition against cruel and excessive punishment.

A punishment is considered excessive if it "makes no measurable contribution to acceptable goals of punishment . . . or is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). Imposing the death penalty upon one who has been convicted of a murder which

occurred during the commission of a felony fails to satisfy either of these tests. Lockett v. Ohio, 23 Cr.L. 3215, 3226 (White, dissent and concurrence).

Initially, the gross disproportion which exists between the culpability of the individual for the unfortunate death of another mandates that the sentence is excessive. If one acts without the intent to take a person's life, but through misfortune, accident or chance a person dies, the responsibility for that death is even more tenuous.

Presently, half of the states do not allow a person to be sentenced to death who has been convicted of a felony-murder. Lockett v. Ohio, supra. This is in recognition of the disproportionate nature of the penalty sought to be inflicted. There is simply no way to justify putting someone to death for an accident.

In addition to the disproportionate punishment to the severity of the crime itself, such a punishment serves none of the recognized goals for which a sentence is imposed.

The deterrent effect is minimal if non-existent. If a person commits Crime A, knowing that he could be punished from Crime A, but Crime B accidentally occurs through circumstances over which he may have no control, punishing for Crime B cannot logically deter subsequent commissions of Crime B.

Where an individual has no intent or acts without culpability to bring about the death of another person, imposition of the death penalty is excessive.

THE STATE'S FAILURE TO CHARGE PETITIONER UNDER THE SENTENCING STATUTE, A.R.S. § 13-454 DEPRIVED HIM OF ADEQUATE NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION IN VIOLATION OF THE SIXTH AMENDMENT.

Nowhere in the Information filed against Petitioner was he given notice that he could suffer death. The two charges read as follows: "On or about the 15th day of December, 1973, Mitchell Thomas Blazak murdered Elden Patrick Baker, all in fiolation of A.R.S. § 13-451, § 13-452 and § 13-453." "On or about the 15th day of December, 1973, Mitchell Thomas Blazak murdered John T. Grimm, all in violation of A.R.S. § 13-451, § 13-452 and § 13-453."

A.R.S. § 13-451 was the statute defining murder and malice aforethought. A.R.S. § 13-452 was the statute defining degrees of murder. A.R.S. § 13-453 was the statute providing for the punishment of murder. In paragraph A, the punishment for first degree murder was declared to be life imprisonment or death, and the statute made reference to A.R.S. § 13-454. A.R.S. § 13-454 was the statute which listed aggravating and mitigating circumstances and provided that the court "shall impose a sentence of death, if the court finds one or more of the aggravating circumstances enumerated in subsection E, and that there are no mitigating circumstances sufficiently substantial to call for leniency." Nowhere in the Information filed against Petitioner was he put on notice that any of the aggravating circumstances listed under A.R.S.§ 13-454(E) was a matter which the State intended to prove.

The Sixth Amendment to the United States Constitution provides that the accused in all criminal prosecutions shall have the right to be informed of the nature and cause of the accusation. Article 2, § 24 of the Arizona Constitution gives to all persons accused of criminal offenses the right to demand the nature and cause of the accusation. Failing to put Petitioner on notice in the charging document that he was accused of a capital crime was a violation of these constitutional provisions. The United States Supreme Court has held repeatedly that a capital offense is unlike any other offense in the criminal law. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972); Woodson v. North Carolina, 428 U.S. 280. 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

ARIZONA'S DEATH PENALTY SCHEME AS DESCRIBED BY STATE V. WATSON CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

As described by State v Watson, supra, Arizona's death penalty scheme now allows for the death penalty to be given following a weighing of aggravating and mitigating factors. However, while the aggravating factors are limited, the mitigating factors are unlimited.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court struck down the Georgia and Texas death penalty statutes. These statues were held to violate the Eighth Amendment prohibition against cruel and unusual punishments. In Furman, supra, there were five separate Opinions written for the majority. Justices Marshall and Brennan held that capital punishment is unconstitutional on its face. Others of the

majority, however, took a more limited view. Justices Brennan, White and Douglas held against capital punishment principally because of the way in which it had been imposed. But as Mr. Justice Brennan wrote, "No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Page 294.

Mr. Justice Stewart wrote:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. Page 309.

Mr. Justice White also found the death penalty lacking for the reason that there appeared "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Page 313.

Thus, Furman v. Georgia, supra, has come to stand for the holding that a death sentence scheme which sees death sentences imposed in a freakish, arbitrary and wanton fashion, without a way of meaningful review, violates the United States Constitution.

Petitioner asserts that the defects identified in Furman v. Georgia are now present in the Arizona death penalty scheme as written by State v. Watson, supra. There is no way of ascertaining, under present law, what may not constitute a "mitigating factor." To one sentencing judge, the fact that an accused is a devout member of the Jainist religion may save the accused's life. To another judge, this "factor" may be meaningless. To one judge,

the fact that an accused take part in community service programs from his prison cell may be enough to spare his life. To another judge, it will not avail. To one judge, the fact that the victim of a homicide was himself indulging in immoral or illegal acts may be mitigation. To another judge, not so. This list could go on at length. The point is that the uniformity of standards, required by the reasoning of Furman v. Georgia, is absent under Arizona's death penalty scheme.

Further, it will be seen that the way in which the death penalty has been used in Arizona, since 1974, is abusive of the standards enunciated in Furman v. Georgia. Prosecutorial selectivity becomes nothing more than arbitrariness. And judicial errors in the conduct of capital cases results in "freakish" sparings of the death penalty, where it might otherwise be required.

In sum, the Eighth Amendment to the United States Constitution, as interpreted by Furman v. Georgia is violated by Arizona's current death penalty scheme.

THE DEATH PENALTY SHOULD BE IMPOSED ONLY BY A JURY, PURSUANT TO THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

Failure to allow a jury to determine the existence or non-existence of mitigating or aggravating circumstances withdraws from the sentencing procedures an integral and necessary component in determining whether or not an individual should be put to death or spared.

Although it would seem that juries are not constitutionally

required, Proffitt v. Florida, 49 L.Ed.2d 913, 923 (1976), the jury's role in sentencing is of utmost importance. The recent decision of Lockett v. Ohio, 23 Cr.L. 3215 (1978) and Bell v. Ohio, 23 Cr.L. 3229 (1978) have left unanswered just exactly what function a jury should have in a capital sentencing system.

In reaching its decision in Proffitt, the Court had before it a capital sentencing system which provides for jury input. Fla. Rev. Stat. 921.141. Similarly, in upholding the Georgia death penalty procedure, § 27.2534.1(c), the court considered another method of deciding whom to put to death, which had jury input. Gregg v. Georgia, 49 L.Ed.2d 859, 888 (1976). Likewise, in upholding the Texas statutory scheme for imposing the death penalty, Texas Code of Crim.Proc.Art. 37.071, the court ruled upon a sentencing procedure which allowed jury input. (Jurek v. Texas, 49 L.Ed.2d 929, 936-937 (1976).

In Arizona, there is no such input from the jury. This exclusion of the jury from deciding whom to spare and whom to condemn is of recent origin. From 1928 until 1973, Arizona had jury input. R.C. 4585 (1928); A.R.S. § 43-2903 (1939), and A.R.S. § 13-453(A) (1956). At a time when imposition of the death penalty without solid standards was permissible, the jury was the final arbiter.

Presently, Arizona has no real standards of mitigation, nor are there any realistic tests for balancing who is to die and who is to live. The jury should be the arbiter of these decisions and not the judge, as the situation presently stands.

In Specht v. Patterson, 386 U.S. 605 (1967), the Court held that the jury is necessary to determine what the sentence should be when new findings of facts are to be made with regard to the sentence. The court in United States v. Kramer, 389 F.2d 909 (2nd Cir. 1961), held that it was for the jury to decide the existence of aggravating circumstances, and not the judge.

Juries act as the conscience of the community and are the arbiters of facts in the judicial process. Their presence is mandated to determine whether to impose death or not. A system which fails to allow jury participation in this very crucial area must be held unconstitutional.

PLACING THE BURDEN OF PROVING MITIGATING CIRCUMSTANCES ON PETITIONER CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The fact that the burden of proving circumstances in mitigation is on the defendant is a per se violation of the Due Process under the Fourteenth Amendment to the United States Constitution. A.R.S. § 13-453 and § 13-454 therefore must be declared unconstitutional.

The Court's attention is called to Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). In Wilbur, the Court stated:

> The Maine law of homicide, as it bears on this case, can be stated succinctly; absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder - unless the defendant proves by a fair preponderance of the evidence

> that it was committed in the heat of passion on sudden provocation, in which case, it is punished as manslaughter --- the issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process. (Emphasis added)

The Court held that placing the burden of proving mitigating circumstances on the defendant violated his right to due process.

This is exactly what the legislature has done in enacting A.R.S. § 13-454.

The State may argue that A.R.S. § 13-454 is a punishment statute and hence a different standard applies.

However, this is substantially the same argument that was raised in the Wilbur case and rejected by the United States Supreme Court. The Court in Wilbur goes on to state:

> Petitioners, the warden of the Maine Prison and the State of Maine, argue that despite these considerations Winship should not be extended to the present case. They note that as a formal matter the absence of the heat of passion on sudden provocation is not a "fact necessary to constitute the crime" of felonious homicide in Maine. In re Winship, 397 U.S. at 364 (emphasis supplied). This disctinction is relevant, according to petitioners, because in Winship the facts at issue were essential to establish criminality in the first instance whereas the fact in question here does not come into play until the jury already has determined that the defendant is guilty and may be punished at least for manslaughter. In this situation, petitioners maintain, the defendant's critical interests in liberty and reputation are no longer of paramount concern since, irrespective of the presence or absence of the heat of passion on sudden provocation,

he is likely to be stigmatized. In short, petitioners would limit Winship to those facts which, if not proved, would wholly exonerate the defendant.

This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blame worth(y)", State v. Lafferty, 309 A.2d at 671,673 (concurring opinion), they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.

The Wilbur decision further holds that the aforementioned principles are a matter of substance, not merely of form:

Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offense of felonious homicide into three distinct punishment categories - murder, voluntary manslaughter and involuntary manslaughter. Only the first two of these categories require that the homicide act either be intentional or the result of criminally reckless conduct. See State v. Lafferty, 309 A.2d at 670-672 (concurring opinion). But under Maine law these facts of intent are not general elements of the crime of felonious homicide. See Petitioner's Brief, at 10 n.5. Instead, they bear only on the appropriate punishment

> category. Thus, if petitioner's argument were accepted, Maine could impose a life sentence for any felonious homicide - even those that traditionally might be considered involuntary manslaughter - unless the defendant was able to prove that his act was neither intentional nor criminally reckless.
>
> Winship is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State", St. Louis SW R. Co. v. Arkansas, 235 U.S. 350, 362 (1914), and to interests of both the State and the defendant as affected by the allocation of the burden of proof.

It is submitted that the Arizona Legislature has chosen to create the new crime of "aggravated first degree murder" having specific elements. It cannot shift the burden to the defendant to prove circumstances in mitigation and then deny the defendant a jury trial. The Court must look to the "substance" of what the legislature created and not to the "form".

THE ARIZONA DEATH PENALTY HAS BEEN APPLIED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The death penalty is also being used in a manner discriminatory against male persons. At the present time, there is no woman on Arizona's death row. This is so, despite the fact that women have been accused of first degree murder and aggravating circumstances have appeared. For example, see State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (1979).

Discrimination on the basis of sex does violate the Fourteenth Amendment to the Constitution. See, for example,

Sailer Inn, Inc., v. Kirby, 485 P.2d 529 (1971); State v. Holsinger, 124 Ariz. 18, 601 P.2d 1054 (1979).

THE PROSECUTION'S FAILURE TO REVEAL THE WHEREABOUTS OF CERTAIN WITNESSES FOR THE SENTENCING HEARING CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The Supreme Court of the United States has addressed the issue of the suppression of evidence favorable to an accused by the prosecution in two major cases. In the landmark case of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court held that the prosecution's suppression of evidence favorable to an accused and requested by him violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The Court stated that a prosecution that withholds evidence requested by an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. Further, this casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though his action is not the result of guile.

A more recent decision of the court, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), discussed the proper standard of materiality of undisclosed evidence in deter-

mining whether the prosecutor's failure to disclose this evidence to the defense denied the defendant a fair trial. The court concluded that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed.

Petitioner clearly acknowledges that the evidence suppressed would not have created a reasonable doubt of guilt. He is simply asserting that the prosecution suppressed evidence favorable to him, that the evidence is material to the punishment he received, and further, that this action by the prosecutor violated the Petitioner's rights of due process as defined by the Brady decision. The defendant is not here requesting a new trial as a result of prosecutorial misconduct. It follows that the Agurs test of materiality of the suppressed evidence does not apply to the case at bar. The defendant therefore does not have to demonstrate the materiality of the omitted evidence by showing that it creates a reasonable doubt of guilty, since this test is applicable only in the case where an accused asserts that the prosecutor's suppression of evidence entitles him to a new trial.

It must be reiterated that at the resentencing hearing, unlike the trial, the defendant has the burden to go forward with evidence of mitigation. This sentencing procedure is being imposed more than five years after the original conviction in this case. Furthermore, the current sentencing structure was modified to allow the defendant greater range within which to produce mitigating evidence. Unfortunately this was not the

structure under which he was originally sentenced. He does not have the benefit of a complete trial record on the issue of mitigation to which he can refer, as did the prosecution.

As the trial attorney for Petitioner testified at the re-sentencing hearing, he felt constrained by the old sentencing statute and believed that there was little he could do. In explaining the nature of the evidence he would have put on at the original sentencing, Mr. Kashman specifically mentioned character evidence, employment records, and the testimony of the defendant's young wife, Sandy Blazak. (R.T. September 11, 1980, pp.3-9).

It must be admitted that the nature of the evidence sought from the prosecutor could be termed somewhat speculative. This is due not only to the new sentencing structure but also to the lapse of time between the conviction and the resentencing. These factors only compound the defendant's burden of producing evidence of mitigation and demonstrating the materiality of the evidence suppressed by the prosecution. In United States v. Bryant, 439 F.2d 642 (1971), the Court of Appeals for the District of Columbia was faced with the loss of tape recorded evidence. The tape could have corroborated the agent's story pefrectly, or it could have completely undercut the Government's case. The court stated that there was room for nothing except doubt as to the effect of disclosure because the conversations recorded on the tape were crucial to the question of the appellant's guilt or innocence. It concluded that were Brady and its progeny applicable only when the exact content of the non-disclosed

materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence through destruction rather than mere failure to reveal.

The court stated:

> The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather it is also to make the trial a search for truth informed by relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government.
>
> Bryant, 439 F.2d at 648.

Similarly, in the case at bar, the whereabouts of witnesses who may be able to produce evidence of mitigation is in the exclusive control of the prosecution. The hearings prior to the resentencing at which Mr. Heuisler and Mr. Hartle testified point out the imbalance of investigative resources between the state and the defense. The prosecutor does have a duty to provide the defense with evidence of mitigation, albeit speculative, in order to ensure that the sentence of death is justified under the new sentencing structure. Finally, the defendant recognizes the principle espoused by the 5th Circuit in State v. Gonzales, 466 F.2d 1286 (1972), that the government is under no constitutional duty to assist the

defendant in locating all witnesses who have knowledge of the case, and therefore may be helpful in some general way to defendant's preparation. This is not to say, however, as did the court in United States v. Quinn, 364 F. Supp. 432 (1973),

> Where the defendant shows particular need for the identity and whereabouts of a specific person or persons or where egregious circumstances warrant, the court will compel disclosure of witnesses to ensure the defendant's right to due process.
>
> Quinn, 364 F.2d at 445.

Unlike the defendant in Quinn, supra, Petitioner made a specific request for the location of specific witnesses he wished to call for the purpose of presenting evidence of mitigation. No general request was made of the prosecutor to supply the names and addresses of all persons having knowledge of the facts of the case. Consequently, severe prejudice to Petitioner's cause resulted from the Government's refusal to assist him.

The 9th Circuit in United States v. Miller, 529 F.2d 1125 (1976), made this point very clear when it stated that if the Government, upon request by the accused, has serious doubts about the usefulness of the evidence to the defense, the government should resolve all doubts in favor of full disclosure. "Such a rule appears particularly appropriate since disclosure could cause no harm to the Government while suppression could very will prejudice the defendant." Miller, supra, 529 F.2d at 1128.

Further the Miller court stated that the fact the Government may have concluded in good faith that the evidence would not be very helpful to the defendant does not excuse its failure to disclose. The court held that:

> The prosecutor is not merely an advocate for a party; he is also an administrator of justice. See A.B.A. Standards, The Prosecution Function § 1.1(b), (c) (1971). Considering the vast investigatory resources and powers at the Government's disposal, an elemental sense of fair play demands disclosure of evidence that in any way may be exculpatory. See A.B.A. Standards, Discovery and Procedure Before Trial, § 2.1(c) (1970). Id.

Similarly the District of Columbia Circuit in United States v. Bowles, 488 F.2d 1307 (1973), extended the prosecutor's duty to disclose not only evidence which was itself exculpatory but also to disclose the means of obtaining evidence. "Clearly, leads to relevant evidence cannot be withheld." Bowles, supra, 488 F.2d at 1313.

In the case at bar, the addresses of witnesses who may provide Petitioner with the means of obtaining evidence of mitigation were withheld by the prosecutor. The prosecutor's suppression of these leads to relevant evidence severely prejudiced Petitioner's ability to carry the burden of producing mitigating evidence. Without the benefit of at least the whereabouts of the crucial witnesses Petitioner was unable to utilize the new resentencing system expanded by the Arizona Supreme Court's decision in Watson, supra. As a result no new evidence was presented.

The defendant asserts that the prosecutor deliberately misled the sentencing court as to the willingness of the County Attorney's

Office to supply the addresses of witnesses presently in its possession. Due to the blatant refusal by the Pima County Attorney's Office, the evidence that might have mitigated the sentence of Mitchell Blazak was deliberately withheld.

At the sentencing hearing of Petitioner held on September 11, 1980, Mr. Michael Callahan posed the following question to Mr. William F. Heuisler, professional investigator hired by the defendant's attorney Thomas E. Higgins. (R.T. Sept. 11, 1980, p.32).

> MR. CALLAHAN: Okay, did you ever contact anyone from the County Attorney's Office, not just Rex, but make any kind of inquiry to see if any assistance from our side of things would be forthcoming in locating people?
>
> MR. HEUISLER: Well, first of all I would have considered that improper. And second of all, I wouldn't have done it without direction from Mr. Higgins.
>
> MR. CALLAHAN: So I assume you didn't make any contact like that?
>
> MR. HEUISLER: Absolutely not.

On the 19th of September, 1980, Mr. Heuisler contacted County Attorney Investigator Rex Angeley as to the whereabouts of witnesses needed for the resentencing of Petitioner. In a sworn affidavit made on the 14th of October, 1980, (attached as Exhibit "A") Mr. Heuisler stated that he was refused any information as to the whereabouts of seven listed witnesses. Mr. Heuisler stated that the reasons given for this refusal were "this has been litigated before" and "these people have been questioned and have testified; we know what they have to say."

Subsequently, Rex Angeley of the County Attorney's Office filed an affidavit on December 12, 1980 (attached as Exhibit "B") which did not in fact controvert the allegations of the conversation between Mr. Heuisler and Mr. Angeley. While Mr. Angeley supplied some additional facts concerning the conversation, he stated explicitly that he refused Mr. Heuisler information as to the whereabouts of Sandra Blazak because she had expressed fear of her former husband. In view of the fact that Mr. Blazak had been sentenced to death and that if mitigating evidence were found he would nonetheless be incarcerated for life without possibility of parole for at least 25 years, Mr. Angeley's response cannot be termed anything other than a deliberate refusal to cooperate with the defense.

The Seventh Circuit in United States v. Disston, 612 F.2d 1035 (1980), held that even if the withheld evidence is not conclusively material, nondisclosure of information is reversible error when the prosecutor's failure to reveal the evidence was not in good faith. Citing United States v. Esposito, 523 F.2d 242, 249 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1515, 47 L.Ed.2d 768 (1976).

Similarly the 10th Circuit in United States v. Harris, 462 F.2d 1033 (1972), stated that in cases involving the deliberate suppression of exculpatory evidence courts will not inquire into the elusive question of actual prejudice affecting the result of a criminal prosecution. The Harris court concluded that the denied evidence resulted from what it termed an unintentional and passive (though not excusable) nondisclosure. It

indicated that in such a case the court must nevertheless determine whether the trial was merely imperfect or was unacceptably unfair.

In view of Mr. Callahan's statement openly acknowledging the existence of evidence which might have been of some use to the defense at the resentencing hearing and in view of the County Attorney's Office's refusal to disclose any of the requested information to the defense, it is clear that the prosecution deliberately suppressed evidence of the whereabouts of witnesses sought by the defense in preparation for the resentencing hearing. Petitioner asserts that this deliberate suppression of evidence prejudiced his ability to produce mitigating evidence, or in the alternative that the resentencing procedure was unacceptably unfair.

In conclusion let us review several points. First the Brady decision mandates a finding that the evidence suppressed by the prosecution constitutes a deprivation of Petitioner's due process rights. Second, the standard for determining the materiality of suppressed exculpatory evidence defined by the Agurs decision, supra, should not be strictly applied to a resentencing hearing where punishment and not guilt is determined. Third, the testimony of Mr. Kashman, Petitoner's trial attorney, indicated the favorable quality of the testimony of the witnesses whose whereabouts were requested. Finally, the nature of the new sentencing procedure defined by Watson, supra, clearly lessens the requirement of materiality of any mitigating evidence the defendant in a

first degree murder case may be able to produce at time of sentencing. Given the nature of the penalty to be imposed on Petitioner, and the fact that he is only attempting to mitigate his sentence, this Court should allow him further opportunity to produce whatever evidence was suppressed without regard to the standard of materiality at trial.

Where serious doubt as to the exculpatory quality of a particular item or items of evidence exists, the state should turn such evidence over to the court for a determination of its exculpatory value. Finally, any doubts as to what evidence is exculpatory should be resolved in favor of the defendant. United States v. Hearst, 412 F.Supp. 863, 870 (1975).

SENTENCING PETITIONER TO DEATH BASED ON THE TRIAL COURT'S FINDING OF ONE OR MORE PROPER AGGRAVATING CIRCUMSTANCES BUT ALSO ON AN IMPROPER AGGRAVATING CIRCUMSTANCE CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

A case in point is Bufford v. State, 382 So.2d 1162 (Ala. 1980), in which the trial court found aggravating circumstances of robbery or attempt thereof; a heinous, atrocious and cruel death; committing a capital felony for pecuniary gain; defendant being under sentence of imprisonment at the time; and prior convictions for assault and battery and abusive language. The Alabama Supreme Court found that the robbery or attempt thereof, the pecuniary gain motive and the previous convictions were improper aggravating circumstances and held that where the trial court based its sentence on one or more improper aggravating

circumstances as well as one or more proper aggravating circumstances, the case must be remanded and a new sentencing hearing was required.

In the case at bar, the trial court found as an aggravating circumstance that the crime had been committed in an especially heinous, cruel and depraved manner. The Arizona Supreme Court stated, "Even though we do not believe the shooting in the instant case was cruel, heinous or depraved, it does not follow that the death penalty cannot be imposed. Even in the absence of this aggravating circumstance, there are still enough aggravating circumstances that cannot be overcome by the mitigating circumstances." State v. Blazak, supra. Petitioner contends that this case should be remanded for a new sentencing hearing because of the prejudice afforded by this erroneous finding of the trial court.

The Fifth Circuit Court of Appeals has held in Stephens v. Zant, 631 F.2d 397, U.S. S.Ct. 81-89 (1980), that the death sentence must be vacated where the jury had found three statutory aggravating circumstances but one of the circumstances, that of serious assaultive criminal convictions, was declared unconstitutional by the Georgia Supreme Court following defendant's trial but before his direct appeal. The case was reversed and remanded.

A similar circumstance has occurred in the history of the case at bar. The statutory scheme of the Arizona death penalty was changed by the Arizona Supreme Court's decision in Watson, supra,

which required Petitioner's resentencing under circumstances which prevented him from fairly presenting his position at the resentencing hearing.

Several other cases support Petitioner's position. The death sentence was set aside and the case remanded for a new sentencing trial by the Wyoming Supreme Court in Hopkinson v. State, 632 P. 2d 79 (Wyo., 1981), when the verdict form given to the jurors stated as an aggravating circumstance that defendant was previously convicted of felony involving use or threat of violence to the person, but at the time of the murder in question, defendant was not found to have been convicted of such a felony.

In Elledge v. State, 346 So.2d 998 (Fla., 1977), the Florida Supreme Court held that error in admitting evidence of defendant's confession to a murder for which he had not been convicted, a non-statutory aggravating factor, required that the sentence be set aside and the cause remanded.

The Supreme Court of Tennessee in State.v. Moore, 614 S.W.2d 348 (Tenn., 1981), remanded the case for resentencing where it found insufficient evidence to support the jury finding of an aggravating circumstance of arson, which involved burglarizing and setting fire to an empty dwelling, but no use of threat of danger, nor any actual danger to any other person was involved.

These cases show that Petitioner's sentence based on an improper aggravating circumstance as well as proper aggravating circumstances should be set aside.

CONCLUSION

Delaying the sentencing of Petitioner more than five years after his conviction is a denial of the constitutional right to a speedy trial. This delay has made it impossible to reconstruct the important mitigating factors needed for Arizona's new sentencing structure created by the Arizona Supreme Court's decision in State v. Watson, supra.

The imposition of the death penalty for a felony murder is disproportionately severe and serves none of the recognized goals for which such a sentence should be imposed. In addition, the death penalty scheme in Arizona is cruel and unusual in its lack of predictability.

The State's failure to charge Petitioner under the Arizona sentencing statute left him without sufficient notice that he could suffer death at the hands of the State. Excluding the jury from the sentencing process has served to deprive Petitioner of the right to a judgment by his peers in the community.

Requiring Petition to prove the mitigating circumstances has laid too heavy a burden upon him. Since this distinction has been created by the State, the State should bear the responsibility of proving it.

There are no women on death row in Arizona; this leads one to the conclusion that the death penalty has been applied in violation of the equal protection clause.

The refusal of the prosecution to reveal the whereabouts of certain witnesses for the sentencing hearing is a grave

deprivation of Petitioner's right to present the best case possible for the mitigation of his sentencing.

Petitioner therefore asks that this Court grant his Petition for Writ of Certiorari.

RESPECTFULLY submitted this 21st day of July, 1982.

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